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Supreme Court
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No. 97-313

In The

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The New York Court of Appeals dismissed that part of the petitioner's his motion that sought leave to appeal to that Court from the New York State Supreme Court, Appellate Division, Fourth Department order affirming the New York State Supreme Court's order denying his motion to renew summary judgment motions in which the respondents had been successful in obtaining dismissal of his complaint in this medical malpractice action. The Court of Appeals then denied that part of petitioner's motion for leave to appeal from the Appellate Division's affirmance of the dismissal of the complaint. Although petitioner appears to be seeking review by this Court solely of that part of the Court of Appeals' order denying him leave to appeal from the dismissal of his complaint, inasmuch as it is not clear, affirmance of the denial of his motion to renew is also discussed herein.

A. Relevant Facts Omitted by the Petitioner

Ida Guthmann, an 81 year old woman, was brought to the Crouse Irving Memorial Hospital ("Crouse") emergency room on September 10, 1989 in an unconscious state, with a medical history that included progressive dementia, a prior myocardial infraction, paroxysmal atrial fibrillation, high blood pressure, sarcoid osteoarthritis, and latent diabetes. She presented with subdural hematomas for which an emergency craniotomy was performed. She remained at Crouse in a vegetative state until her death almost two years later. During that time, she had a tracheostomy because of prolonged intubation and had a feeding tube in her stomach.

In August of 1991 when Mrs. Guthmann spiked a fever, her treating physician called in an infectious disease specialist and a cardiologist to assist in diagnosis and the determination of an appropriate course of treatment. Chest x-rays showed no sign of pneumonia, and a ventilation perfusion showed a high probability of pulmonary embolism, for which she was treated. Until her death, Mrs.

Guthmann was given oxygen by face mask, received respiratory therapy at least four times a day, was monitored continuously by the hospital staff and was given the medication and treatment ordered by her physicians.

Mrs. Guthmann's condition continued to deteriorate. Her treating physician determined that intubation would be futile, and that there was little hope of recovery or significant improvement. The specialists who had been called in concurred. Ultimately, Mrs. Guthmann was found not breathing and with no pulse. A code was called. Cardiovascular resuscitation compression and masked breathing were initiated, and Atropine and Epinephrine were administered, all to no avail.

B. Petitioner's Federal Claims

The federal statutory provisions cited in the petition, the Emergency Medical Treatment and Active Labor Act,

42 U.S.C. §1395dd ("EMTALA"), the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, were raised by the petitioner for the first time on his appeal to the Appellate Division. Under New York law, arguments generally must be raised in the lower court in order to properly be before the Appellate Division for review. *Utica Board of Water Supply v. New York State Health Department*, 96 A.D.2d 719 (4th Dep't 1983).

The Appellate Division did not render a written opinion in affirming the dismissal of the petitioner's complaint and denial of his motion to renew. There is no basis for concluding that the Court did not follow its own precedent in deciding the appeal, or that it even considered the petitioner's federal statutory arguments raised for the first time on the appeal.

THE WRIT SHOULD BE DENIED

A. The Supreme Court has no Jurisdiction

Petitioner seeks to invoke this Court's jurisdiction

under 28 U.S.C. §1257. Under that jurisdictional provision, final judgments of the highest state court in which a decision could be had may be reviewed only where:

> ...the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This Court has no jurisdiction to review state court determinations of purely state law. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). Moreover, the exercise of jurisdiction by this Court is precluded where there are independent and

adequate state law grounds for the state court decision. *id.*

Under New York law, in order to defeat the respondents' summary judgment motions petitioner was required to produce an expert affidavit providing evidentiary support for his claims of medical malpractice and abandonment once the respondents had satisfied the burden of making a prima facie showing of entitlement to judgment . *Fiore v. Galang*, 64 N.Y.2d 999 (1985). He failed to do so, and the Court below properly granted the respondents' motions by the application of New York State law.

With regard to the petitioner's motion to renew, the lower court properly exercised the discretion given it under state law to deny the motion for failure to make a showing that that new facts presented were unknown and not discoverable at the time of the original motion. *Gifaldi v. Dumont Co., Inc.*, 172 A.D.2d 1025 (4th Dep't 1991).

While this Court would not be bound by a state court determination that the federal statutory claims were raised properly by the petitioner in the state court proceedings,

there is no basis in this case for concluding that they were, when the petitioner himself concedes that the claims were not asserted until his appeal to the Appellate Division. (Petition, p. 1). Moreover, there is no reason to believe that federal law played any part whatsoever in the Court of Appeals decision to deny the motion for leave to appeal (the only order with respect to which the writ is sought).

B. There is No Reason to Grant the Writ

This case is not one in which a state court of last resort has decided an important federal question in a manner that conflicts with the decision of another state's court of last resort or a United States Court of Appeals. This is not a case in which the state court has decided an important question of federal law that has not been, but should be settled by this Court, or conflicts with any relevant decision of this Court. This is a simple state law medical malpractice case.

The Appellate Division correctly applied state law in affirming the dismissal of the petitioner's medical malpractice action and the denial of his motion to renew. Moreover, if the state court had considered the petitioner's untimely federal law claims, the court would have had to conclude that they had no merit.

The EMTALA applies only when a patient coming into an emergency room does not receive proper medical screening or is not stabilized before being transferred or discharged. *Matter of Baby K*, 16 F.3d 590 (4th Cir.), *cert. denied* 115 S.Ct. 91 (1994). Mrs. Guthmann had been a patient at Crouse for close to two years at the time of the alleged malpractice and abandonment.

The purpose of the Rehabilitation Act is to prohibit discrimination on the basis of handicap by programs receiving federal aid. *Stephanidis v. Yale University*, 652 F.Supp. 110 (D.Conn. 1986), *aff'd* 814 F.2d 654 (2d Cir. 1986). There was no evidence of discrimination on the basis of a handicapping condition before the state court.

The ADA expands the Rehabilitation Act to cover discrimination by entities that do not receive federal funding. *McDonald v. Com. of Pa. Dept. of Public Welfare*, 62 F.3d 92 (3d Cir. 1995). It prohibits discrimination on account of disability in employment, provision of public services, and in public accommodations. There was no evidence before the state court showing discrimination of any kind in the care and treatment of Mrs. Guthmann.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

DATED: August 26, 1997

Respectfully submitted,

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